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QUARTERLY REPORT

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The Quarterly Report provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have this sent electronically or wishes to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at kmcdowel@doe.in.gov.

In this report:

ANTI-HOMOSEXUAL BULLYING AND STUDENT-ON-STUDENT SEXUAL HARASSMENT BASED ON MALE STEREOTYPES

Indiana statutory provisions forbid "bullying"[1] and require school boards to ensure that their discipline rules address bullying behavior, including procedures for investigating complaints and intervening in reported cases.[2] Bullying behavior occurs under a number of circumstances. One recurring type of such behavior involves the harassment of a student based on the perceived sexual orientation of the student. Although Indiana law attempts to shield school boards from failure to comply with the Indiana anti-bullying law, see I.C. § 20-33-8-13.5(c), a victim may have remedies under federal law, notably Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance...

Title IX will apply to most Local Educational Agencies (LEAs) in each State because of receipt of federal financial assistance in some form. Such recipients may be liable for damages under Title IX for student-on-student sexual harassment where the victim can demonstrate the following three elements:

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[1] **I.C. § 20-33-8-0.2 "Bullying"**
Sec. 0.2. As used in this chapter, "bullying" means overt, repeated acts or gestures, including:
(1) verbal or written communications transmitted;
(2) physical acts committed; or
(3) any other behaviors committed;
by a student or group of students against another student with the intent to harass, ridicule, humiliate, intimidate, or harm the other student.

[2] **I.C. § 20-33-8-13.5 Discipline Rules Prohibiting Bullying Required**
Sec. 13.5. (a) Discipline rules adopted by the governing body of a school corporation under section 12 [I.C. § 20-33-8-12] of this chapter must:
(1) prohibit bullying; and
(2) include provisions concerning education, parental involvement, reporting, investigation, and intervention.
(b) The discipline rules described in subsection (a) must apply when a student is:
(1) on school grounds immediately before or during school hours, immediately after school hours, or at any other time when the school is being used by a school group;
(2) off school grounds at a school activity, function, or event;
(3) traveling to or from school or a school activity, function, or event; or
(4) using property or equipment provided by the school.
(c) This section may not be construed to give rise to a cause of action against a person or school corporation based on an allegation of noncompliance with this section. Noncompliance with this section may not be used as evidence against a school corporation in a cause of action.

1. The sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;

2. The funding recipient had actual knowledge of the sexual harassment; and

3. The funding recipient was deliberately indifferent to the harassment.

Davis v. Monroe County Board of Education, 526 U.S. 629, 653, 119 S. Ct. 1661 (1999). *Davis* involved a fifth-grade student who was subjected to a prolonged pattern of sexual harassment from a classmate. The harassment included inappropriate touching and vulgar comments. The student reported these incidents to her mother and her classroom teacher. The teacher assured the mother that the school principal had been advised of these incidents. Notwithstanding these reports, the harassing student was not disciplined and the harassment continued, both in the classroom and in the hallways. The student continued to report the incidents to teachers and attempted to speak with the principal. After nearly six months of these activities, the harassing student was finally charged with sexual battery, to which he pleaded guilty. The student-victim's previously high grades dropped as she became unable to concentrate on her studies. She also contemplated suicide. The Supreme Court found that a school board could be liable for damages under Title IX for student-on-student harassment where the school had actual knowledge of the sexual harassment but was deliberately indifferent to the sexual harassment, and the harassment was so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to educational opportunities or benefits provided by the school.

The extent to which Title IX will apply to student-on-student harassment arising from perceived sexual orientation is not clear. Such harassment is not based on gender but can be based on one's failure to adhere to male or female stereotypes. Title IX claims of this sort are often accompanied by an Equal Protection claim under the Fourteenth Amendment.

Equal Protection and Perceived Sexual Orientation

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) was the first important case involving the issue of sexual harassment of a student based on the student's perceived sexual orientation, although the case was decided under the Equal Protection Clause of the Fourteenth Amendment rather than Title IX.[3] During middle school and high school, Nabozny was continually harassed and physically abused by other students who believed he was a homosexual. He was repeatedly subjected to epithets such as "faggot." Students would strike him or spit on him. He was assaulted in a science class where two students engaged in a "mock rape" of Nabozny while 20 other students looked on and laughed. Nabozny reported these incidents to school officials and asked for protection, but they failed to act. Even though the school district had a policy requiring the investigation and punishing of student-on-student battery and sexual harassment,

[3]See "Peer Sexual Orientation Harassment," **Quarterly Report** January-March: 2003. *Nabozny* was decided prior to the Supreme Court's decision in *Davis v. Monroe County*.

no such actions were undertaken on his behalf. There was some evidence that "some of the administrators themselves mocked Nabozny's predicament." 92 F.3d at 449.

The principal's response to the "mock rape" incident was that "boys will be boys," and she told Nabozny that if he were "going to be so openly gay," he should "expect" such behavior. Nabozny was also assaulted in a bathroom by several other boys. The principal again told him he should "expect" such behavior and did nothing to investigate or punish the students who were attacking him. Nabozny attempted suicide. After a stay in the hospital, he completed middle school in a nonpublic school.

In high school, the harassment–including the physical assaults–continued. His attackers were not punished, but he was reassigned to another class. He again attempted suicide and later ran away from home. When he returned to school, he was again attacked. In one incident, he was so savagely beaten that he suffered internal injuries. The principal again did nothing. He withdrew from school and enrolled in a school in another state.

Nabozny eventually filed suit, asserting, in part, violations of his Fourteenth Amendment right to equal protection. The federal district court granted summary judgment to the school defendants, but the 7th Circuit reversed the district court in part. The 7th Circuit noted that the Equal Protection Clause of the Fourteenth Amendment grants to all "the right to be free from invidious discrimination in statutory classifications and other governmental activity. *Id*. at 453, citing to *Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 2691 (1980). An equal protection violation requires a showing of intentional or purposeful discrimination. A "discriminatory purpose" is more than an active involvement. "It implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group." *Id*. at 454 (citation omitted).

> A showing that the defendants were negligent will not suffice. Nabozny must show that the defendants acted either intentionally or with deliberate indifference. [Citations omitted.] To escape liability, the defendants either must prove that they did not discriminate against Nabozny, or at a bare minimum, the defendants' discriminatory conduct must satisfy one of the two well established standards of review: heightened scrutiny in the case of gender discrimination, or rational basis in the case of sexual orientation.

Id. The 7th Circuit found that Nabozny had satisfied his burden of proof with regard to the school district's alleged failure to protect him both because of his gender and his perceived sexual orientation. The evidence indicated the school district acted upon male-on-female allegations of harassment but treated male victims differently from female victims. "[T]hey made an exception to their normal practice in Nabozny's case." *Id*.

The Equal Protection Clause does not require a school to provide everyone with identical treatment. However, a school is to treat a person "with equal regard, as having equal worth, regardless of his or her status." *Id*. at 456. The 7th Circuit also found that the school district's different treatment of Nabozny was motivated by their disapproval of his sexual orientation,

"including statements by the defendants that Nabozny should expect to be harassed because he is gay." *Id*. at 457.

Alleged discrimination on the basis of sexual orientation is subject to a rational basis review, where the school district's actions would not amount to a constitutional violation where there are any conceivable, reasonable facts that would provide a rational basis for their actions. "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one." *Id*. at 458. "[W]e hold that reasonable persons in the defendants' positions [during this time period] would have concluded that discrimination against Nabozny based on his sexual orientation was unconstitutional." *Id*.

Title IX and Perceived Sexual Orientation

Seiwert v. Spencer-Owen Community School Corporation, 497 F.Supp.2d 942 (S.D. Ind. 2007) involved the bullying of a student (S.S.) during his 7th and 8th grade years. Classmates called him "gay" and "faggot." He was also physically threatened. He reported these threats to the middle-school principal who responded "don't take all threats seriously."[4] 497 F.Supp.2d at 947. The parents alerted the principal to the bullying during a parent-teacher conference as well as school board members and school administration. The parents also became involved in the development of anti-bullying measures within the school district, including the development of a disciplinary grid to address repeated incidents of student bullying. Despite these communications and efforts, the bullying of S.S. continued. *Id*.

While the class was playing dodge ball during a gym class, S.S. lost his balance. While he was on the floor, several students began kicking him. The gym teacher did not take any action as a result of this assault. *Id*.

S.S. also began to receive threats from several boy students and their girlfriends. Three times the assistant principal was advised of these interactions, but the response was to remove S.S. from the class and place him in another class. The students who were harassing him were not disciplined. The assistant principal believed that if she disciplined the students, the harassment of S.S. would increase. The school also advised the school bus driver, who was an independent contractor, to ensure that one of the students who harassed S.S. be required to sit in the front of the bus and not near S.S. The assignment of bus seats arose from an incident in a reading class where S.S. would not allow one of the "girlfriends" to copy his homework. She said she would have her boyfriend either beat up S.S. or kill him. *Id*. at 948. S.S. suffered an anxiety attack as a result of this run-in. A school counselor spoke to the girl regarding the incident. S.S.'s condition did not improve. His parents removed him from the school for the remainder of the

[4]The decision addresses the school corporation's Motion for Summary Judgment. Since the school corporation was the moving party, the court was obliged to construe the evidence in the light most favorable to the non-moving party (S.S.) and draw all reasonable inferences therefrom in that party's favor. If there are genuine issues of material fact under this analytical framework, the motion will be denied as to such issues. Those issues will proceed to trial.

semester for health reasons. The parents asked that when S.S. returned the second semester, he not be placed in classes with the girl. The school agreed to accommodate this request. *Id*.

Unfortunately, while S.S. was away from school because of the medical concerns, a student started a rumor that S.S. had left school because he had "the AIDS virus." S.S.'s older sister was told by another student that when he returned to school, the girl and her boyfriend would kill S.S. The assistant principal was notified of this threat and indicated she would follow-up on the threat. However, no disciplinary action occurred. *Id*.

The girl again accosted S.S.'s sister, this time on the school bus, indicating that when S.S. returned to school, she and her boyfriend were going to beat him up. The sister informed the bus driver of this threat. S.S.'s father spoke with the mother of the girl. The next school day, S.S. and his sister were on the school bus when the girl wanted to know why S.S.'s father spoke to her mother. The girl then started swearing and yelling at S.S. A melee ensued, with S.S.'s sister being struck at least twice. The bus driver observed the fight in his rearview mirror and ordered the students to stop but never intervened. The school corporation provided both S.S. and the girl with in-school suspension. After this altercation, S.S. was removed from the school corporation and placed in a private school. *Id*. at 949.

Plaintiffs filed suit, asserting multiple theories, including violation of the Equal Protection Clause and Title IX based on the school's alleged failure to halt the bullying with the attendant negative results. The Plaintiffs alleged the school corporation's failures amounted to discrimination based on sexual orientation, real or perceived, and that the school had created a hostile school environment based on the perceived sexual orientation of S.S. *Id*. At 949-50. The Plaintiffs also raised a number of state law issues.

As in *Nabozny*, S.S. alleged the school district's actions violated the Equal Protection Clause. In order to demonstrate an Equal Protection violation, S.S. must show the school acted with a "nefarious discriminatory purpose" and that it discriminated against S.S. based on his membership in a definable class.[5] He must demonstrate the school defendants acted either intentionally or with deliberate indifference to his complaints of harassment. As a preliminary matter, the court did note that the Equal Protection Clause "does, in fact, prohibit discrimination based on sexual orientation." *Id*. at 951. S.S. has provided sufficient evidence that he was harassed because of his perceived membership in a protected class. *Id*. There were repeated incidents of name-calling, death threats, and assault, the latter referring to the incident during the dodge ball session during physical education class. The perpetrators did not have to state that they were attacking S.S. because of his perceived sexual orientation. "Once it has been established that an individual has been repeatedly harassed because of a perceived homosexual orientation, it is up to the jury to determine if all of the harassment is connected or if some of it is associated with some other nondiscriminatory intent." *Id*. at 952.

[5]Although the Plaintiffs include S.S.'s sister and his parents, only S.S.'s claims will be addressed in this article.

Where a school has a practice of punishing perpetrators of battery or harassment, departures from these practices may be evidence of discriminatory intent. *Id*., citing to *Nabozny*, 92 F.3d at 455. Here, the school district failed to adhere to its policies concerning harassment in examining the two death threats against S.S. and failing to examine the other anti-homosexual harassment that occurred at the hands of other students. Summary judgment for the school at this juncture was not warranted. *Id*.

Unlike *Nabozny*, which was decided before the Supreme Court's decision in *Davis v. Monroe County Board of Education*, *supra*, S.S. also brought a claim under Title IX. The district court in S.S. noted that under Title IX, a school may be liable if the school is deliberately indifferent to sexual harassment for which they have actual notice; and the sexual harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to educational opportunities or benefits provided by the school. *Id*., citing *Davis*, 526 U.S. at 650.

The district court found that S.S. did sufficiently demonstrate that he suffered from harassment that was so severe, pervasive, and objectively offensive that it deprived him of educational opportunities or benefits. He was called names for two separate school years; he was kicked by other boys when he fell to the ground during a dodge-ball game; and he received death threats that resulted in his being removed from school, initially for psychological reasons and eventually permanently following the school bus incident.

> These incidents, if true, certainly amount to severe and pervasive conduct that was objectively offensive. Being called outrageous names, physically assaulted, and having one's life threatened is severe and pervasive behavior. The conduct may have been so severe that it actually caused S.S. to no longer be able to attend [the school district].

Id. at 953. There is still one question remaining: whether this harassment is the type of sexual harassment prohibited by Title IX. *Id*. There is no concrete evidence that S.S. was harassed because he was male. However, under other 7th Circuit cases, it is possible for one to state an actionable claim where, as here, the individual is being harassed because of a failure to adhere to specific sexual stereotypes and not because of sexual orientation. *Id*.

> Thus, it is conceivable that an individual could sustain a cause of action under Title IX if he were to demonstrate that he that he was being harassed–not because he was a homosexual, but because he was acting in a manner that did not adhere to the traditional male stereotypes.

Id. The court acknowledged that there is a "fine line between being harassed because of one's sexual orientation and being harassed because of a failure to adhere to traditional male stereotypes." It may be difficult for S.S. to prove that he was harassed because of sexual orientation for Equal Protection purposes and harassed for failure to adhere to traditional male stereotypes under Title IX. "That, however, will be a distinction that the jury must make at trial." *Id*. at *n.* 8. In this case, and for summary judgment purposes, S.S. has demonstrated a claim under Title IX. The evidence also indicates that school officials had actual knowledge of

these incidents. However, actual knowledge is not the determining factor–deliberate indifference is. In this case, the school chose not to discipline an individual who issued at least two death threats to S.S. They also informed S.S. on one occasion that some threats aren't as serious as others. In another instance, the school removed S.S. from the class rather than address the threats and actions of the other students. Finally, during the altercation on the bus, the school punished both S.S. and the other student, "prompting S.S.'s parents to decide that he was no longer safe" at the public school, and that he should be removed and placed in a private school. *Id*. at 954. The students who were attacking S.S. could have construed the school's inaction as "tacit approval of their behavior, prompting them to engage in even greater acts of bullying." *Id*. A jury could conclude these actions were clearly unreasonable. Accordingly, the school district's Motion for Summary Judgment on S.S.'s Title IX claim was denied.

Outside the Seventh Circuit

Patterson v. Hudson Area Schools, et al., 2007 U.S. Dist. LEXIS 87309 (E.D. Mich. 2007) is the most recent case of this type. Dane Patterson suffered extraordinary bullying, threats, and abuse (both verbal and physical) throughout much of middle school and through his freshman year of high school. He was teased (called "Mr. Clean" because of his apparent lack of pubic hair), called names daily ("fag," "faggot," "gay," "queer," "fat pig," "man boobs" and "big boobs"), pushed and shoved by other students (over 200 times in one school year), taunted by a teacher, and slapped by another student. His locker was repeatedly vandalized. His clothes were urinated upon and his shoes thrown in the toilet. He was also sexually assaulted in a locker room incident. Not surprising, he was distraught and became withdrawn, at one time eating his lunch in the band room to escape his tormentors. 2007 U.S. Dist. LEXIS 87309 at *2-11.

School officials were aware of Dane's struggles. In the 7th grade, when taunting and bullying by other students was a daily occurrence, the principal offered to mentor Dane through his difficulties. *Id*. at *3. Near the end of his 7th grade year, he was referred for an evaluation to determine whether he was eligible for services under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400. He was found to be "emotionally impaired" under the IDEA and Michigan law. An Individualized Education Program (IEP) was developed and implemented for Dane. One of the benefits was his access to Ted Adams, his resource room teacher. With Adams' assistance, the 8th grade was a "good year." *Id*. at *5-6.

However, when Dane entered high school the following school year, the taunting and bullying began anew. At the beginning of the school year, Dane did not have Adams as a resource because Adams was a middle-school teacher. Dane did complain to the school counselor, who often interceded on his behalf when students taunted or bullied him. After the school counselor spoke to the offending students, the students stopped bothering Dane. The school investigated other incidents involving Dane and administered disciplinary measures when the perpetrators could be identified. No discipline was meted out where school officials could not ascertain who vandalized Dane's locker or his personal items. Adams, although a middle-school teacher, assumed his previous role with Dane, albeit on a more limited basis. The sexual assault by another student occurred near the end of Dane's freshman year. The school expelled the student who assaulted Dane and punished another student who aided in the assault. The school

cooperated with law enforcement when the assault was later investigated at the instigation of Dane's family. *Id*. at *5-10, 31-32.

Dane did not return to the high school after the assault in the locker room. He completed his secondary education through off-site services and college placement courses. He now attends college. Id. at *11.

Dane's parents sued the school district and its superintendent, asserting claims under Title IX and the Equal Protection Clause of the Fourteenth Amendment. The Defendants moved for summary judgment, which the federal district court granted.

Severe, Pervasive, and Objectively Offensive Conduct

The district court had little difficulty in determining that Dane satisfied the first element in the *Davis* analysis. The student-on-student harassment was of a sexual nature; was severe, pervasive, and objectively offensive; and adversely impacted or denied Dane's access to educational opportunities or benefits through the public school. The persistent name-calling, taunting, bullying, verbal and physical abuse, and, ultimately, the sexual assault were unequivocally offensive and often sexual in nature. The harassment was lengthy and prolonged (his 7th and 9th grade years). The culminating event–the sexual assault–resulted in Dane's withdrawal from the high school. *Id*. at *14-18.

Notice Requirement

There is no dispute that the bullying, taunting, name-calling, vandalizing of personal property, and other activities, most of which were of a sexual nature, had been reported to school personnel. School officials do not deny that they had actual knowledge of the incidents of sexual harassment. *Id*. at *19-21.

Deliberate Indifference

Plaintiffs, however, were unable to prove the third element: that the school district was deliberately indifferent to the harassment. The response of school personnel to Dane's complaints were not "clearly unreasonable." *Id*. at *21-23. The district court noted that "[t]he Supreme Court has stated that when discrimination has been determined to occur (such as when sexual harassment occurs), the responsible party has a duty to take reasonable, timely, age-appropriate, and effective corrective action. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 288, 118 S. Ct. 1989 (1998) [school district was not deliberately indifferent to harassment arising from teacher-student sexual relationship as school district had no notice]. When a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of these circumstances to eliminate the behavior." Id. at *23.

> It is clear that deliberate indifference exists if a district's responses are so inadequate that students undergo harassment or are made more vulnerable to it as a result of the district's responses. [Citations omitted.] In the instant case, the Court finds that administrators at Hudson Area Schools repeatedly took adequate

> and effective remedial action reasonably calculated to end harassment, eliminate the hostile environment and prevent harassment from occurring again. The Court also concludes that, as a matter of law, Defendants' responses were not clearly unreasonable in light of known circumstances.

Id. at *23-24. The judge noted that the school responded to each complaint and, where a perpetrator could be identified, imposed student-specific discipline or intervention that was effective, at least in the sense that the previously offending students no longer engaged in the harassment or were otherwise prevented from doing so through expulsion. *Id*. at *24-25.

The district court also disagreed with the Plaintiffs that the school allowed a known environment of sexual harassment to permeate the school district and failed to respond to it. In addition to the specific interventions undertaken in response to Dane's complaints, the court detailed the school's attempts to address such activities: it adopted a policy prohibiting harassment, including sexual harassment; it brought in speakers to address character development; it initiated programs for students (one was for sexual harassment and bullying; another involved dating, bullying, and peer pressure; still another involved mentoring and peer mediation); it established policies for supervision of hallways, lunchrooms, and locker rooms, with school personnel trained to implement these policies; and it informed students of policies on acceptable student conduct, including the student code of conduct, which has also been incorporated into the Health class curriculum and specifically addresses harassment and bullying. *Id*. at *24-30. "While Defendants' actions may not be exactly what Plaintiffs desired and while their actions may not have yielded the results Plaintiffs hoped for, applicable law provides that the Plaintiffs do not have a right to dictate the actions Defendants take." *Id*. at *30. The standard is whether the school officials' actions were "clearly unreasonable in light of known circumstances." *Id*. The district court found the school did not act in a clearly unreasonable fashion or with deliberate indifference, either generally within the school district or specifically with regard to Dane. *Id*.

The district court judge also rejected the Equal Protection claim. The Equal Protection Clause requires public institutions to treat similarly situated individuals in a similar manner. However, in this case, the Plaintiffs have not identified any "similarly situated individual" much less demonstrated disparate treatment. *Id*. at *35-36.

The Defendants' Motion for Summary Judgment was granted. The Plaintiffs' complaint was dismissed with prejudice. *Id*. at *36.

THE CONSULTATION PROCESS: DETERMINING SERVICES FOR PRIVATE SCHOOL STUDENTS UNDER THE *IDEA*

The No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. § 6301 *et seq.*, included a requirement that agencies receiving federal education funds under the Act engage in "meaningful and timely consultation with appropriate private school officials" to ensure that children in private elementary and secondary schools "in areas served by such agency" will, "on an equitable basis," receive "special educational services or other benefits that address their needs" under certain specified programs. 20 U.S.C. § 7881(a)(1), (b)(1). The NCLB dictates as to what this

consultation process must entail. The agency "shall consult with appropriate private school officials during the design and development of the programs" to discuss such issues as how the children's needs will be identified; what services will be offered; how, where, and by whom the services will be provided; how the services will be assessed and how the results of the assessment will be used to improve those services; the size and scope of the equitable services to be provided to the eligible private school children, teachers, and other educational personnel and the amount of funds available for those services; and how and when the agency will make decisions about the delivery of services, including a thorough consideration and analysis of the views of the private school officials on the provision of contract services through potential third-party providers. 20 U.S.C. § 7881(c)(1).

Should the agency disagree with the views of the private school officials, the agency "shall provide to the private school officials a written explanation of the reasons why the local educational agency has chosen not to use a contractor." § 7881(c)(2). These discussions are to occur before the agency makes any decision regarding the participation of private school children and must include potential service delivery mechanisms, which could include the use of employees of the public agency or through contractual arrangements. § 7881(c)(3), (4), (d)(2).

Should an individual or organization believe a public agency has violated these requirements, the individual or organization can file a complaint with the State Educational Agency (in Indiana, the Indiana Department of Education). If the individual or organization is dissatisfied with the SEA's determination, an appeal can be made to the Secretary of the U.S. Department of Education. 20 U.S.C. § 7883(a),(b).

The Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1400 *et seq.*, was not one of the programs included in the NCLB consultation process. When Congress reauthorized the IDEA through the Individuals with Disabilities Education Improvement Act of 2004, P. L. 108-446 (December 3, 2004), Congress included a consultation process similar to the one it established for certain programs under the NCLB. The "timely and meaningful consultation" process must occur "during the design and development of special education and related services for the children" and must include representatives of both private schools and the parents of parentally placed private school children with disabilities." This consultation must include information on child-find activities and how private school children can benefit from this process; an explanation how the proportionate amount of federal funds available to serve such children was calculated; an explanation as to how the consultation process will continue throughout the year; how, where, and by whom services will be provided for eligible private school students, including the types of services; an explanation of how services will be apportioned if the funds available are insufficient to serve all children; how and when these decisions will be made; and how the public agency will provide a written explanation to private school officials when it disagrees with their views. 20 U.S.C. § 1412(a)(10)(A)(iii)(I)-(V).[6]

[6]Although the consultation process refers to the proportionate share of federal funds, such funds may be supplemented by state and local funds as well. See 20 U.S.C. § 1412(a)(10)(A)(i)(IV).

The IDEA also requires that after such "timely and meaningful consultation," the public agency is to "obtain a written affirmation signed by the representatives of participating private schools[.]" § 1412(a)(10)(A)(iv). Should a private school official believe the public agency did not engage in a timely and meaningful consultation or did not give due consideration to the views of the private school official, the private school official can initiate a complaint investigation with the SEA. Should the private school official be dissatisfied with the SEA's resolution of the dispute, the private school official can appeal to the Secretary. § 1412(a)(10)(A)(v). This consultation process became effective on July 1, 2005.

The federal regulations, which became effective October 13, 2006, mirror the statutory provisions. The consultation, written affirmation, and compliance requirements are found at 34 C.F.R. §§ 300.134, 300.135, and 300.136. The IDEA complaint investigation procedures are more detailed than those required by the NCLB. See 34 C.F.R. §§ 300.151-300.153. Indiana's complaint investigation process is presently found at 511 IAC 7-30-2. These investigations are conducted through the Division of Exceptional Learners (DEL).

The DEL has already received several complaints from private school representatives, either alleging the process was inadequate or it did not occur at all. The following are representative.

Complaint No. CP-252-2008. The complainants, who were administrators from private schools, asserted the school district violated 34 C.F.R. §§ 300.134, 300.135, and 300.136 by failing to ensure timely and meaningful consultation with private schools and parents, and failing to provide due consideration to the views of private school officials. The school district sent on August 9, 2007, notices to private school representatives, advising them of a meeting scheduled for August 29, 2007. The letter advised the private school representatives of the school district's responsibilities under the IDEA. The representatives were to indicate by August 24, 2007, whether they would participate. There was also a form–"the Private School Students and Services Inventory"–which permitted the representatives to indicate what services they perceived as being most crucial for their respective students. This form had to be returned by August 24, 2007, as well. No such letters were sent to representatives of parents of parentally placed private school children. As a result, no parent representatives took part in the meeting.

The complainants attended the meeting on August 29, 2007. However, no meaningful input from the private schools was sought. Rather, the school district wanted the private school representatives to sign an "Affirmation of Confirmation" document. The representatives, however, wanted to discuss the expenditure of a proportionate share of federal funds and direct speech therapy services. The school district's response indicated an intent to continue to move away from direct speech services in favor of "larger group therapy sessions with teacher consultative services[.]"

The school district had 96 eligible students placed in private schools by their parents. The amount of federal funds available would be $128,185.59. The school district did not demonstrate to the representatives how these funds were calculated. The "Affirmation of Consultation" document stated the school district would "annually invite private school and parent representative(s) to consultation regarding the district's design and development of special education and related services for students with disabilities. Throughout the year, ...the

[School] will distribute a survey to parents, school representatives, and administrators of private school(s) seeking feedback to ensure that identified student(s) had meaningfully participated in special education and related services."

Although the "Affirmation of Consultation" document also indicates that decisions will be made by students' respective case conference committees, the representatives stated–and the school district did not deny–that only speech language services on a consultation basis were offered. The representatives indicated their disagreement, asserting that the "consultative approach" would not serve the needs of their students, especially in the area of speech. The school district did not respond to these disagreements, which were written on the back of the "Affirmation of Consultation" form.

The actions of the school district were found to contravene the requirements of 34 C.F.R. § 300.134:

- By failing to invite representatives of parents of parentally placed private school children;
- By holding the consultation meeting on August 29, 2007, after school began, which was not timely for considering the needs of parentally placed private school children;
- By failing to provide a genuine opportunity for all parties to express their views and have these considered by the public school district;
- By failing to explain the calculation of its proportionate share to expend upon such services, and to clarify whether these funds were to be targeted to school-aged students (ages 6 through 21) or early childhood students (ages 3 through 5) or both;
- By failing to discuss how, where, and by whom services would be provided to eligible private school students, including whether such services will include direct or indirect services, how those services will be offered should the federal funds be insufficient for this purpose, and how and when these decisions will be made;
- By dictating that services would be speech consultation services and not discussing any other types of services; and
- By failing to provide a written explanation of the reasons why the school district chose not to accept the views of the private school representatives.

In addition, although the school district's agenda for the meeting did include the five (5) required subjects for the consultation, meaningful consultation did not occur, as required by § 300.135. The failure to give due consideration to the views of the private school officials violated § 300.136(a)(2).

In a rare discussion section, which was based on *Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools* (OSEP, March 2006), the Division of Exceptional Learners noted in relevant part:

> A unilateral offer of services by an LEA with no opportunity for discussion is not adequate consultation. Only after discussing key issues relating to the provision of special education and related services with all representatives should the LEA make its final decisions with respect to the services to be provided to eligible private school children with disabilities.

> ...Decisions about the services that will be provided to parentally-placed private school students with disabilities must be made pursuant to 34 C.F.R. § 300.134. The Division reiterates that the consultation meeting (with the private school representatives and representatives of parents of parentally-placed private school children with disabilities) shall discuss the "types" and "[h]ow, where, and by whom special education and related service will be provided for parentally placed private school students..." *See* 34 C.F.R. § 300.134(d). Thus, the School should use the consultation process to hear the views of [the representatives] before making final decisions regarding the types of services it will provide and how, where and by whom those services will be provided. The School must indicate at the consultation meetings how it will notify private school representatives of the decisions it makes after the meeting takes place.
>
> The Division reminds the School of Indiana's current rule requiring all parentally-placed private school students eligible for special education to be offered some level of services. Under this rule and IDEA, LEAs must spend a proportionate share of their Part B money on parentally-placed private school students. However, like public school students with disabilities, parentally-placed private school students generate state special education funds known as additional pupil count (APC) funds. Therefore, it is permissible for LEAs to use a combination of state and federal funds to meet [their] service obligation[s] under this rule.

Both **Complaint No. CP-300-2007** and **Complaint No. CP-313-2008** involved the same school districts and special education cooperative. Unlike the circumstances in **CP-252-2008** *supra*, the school districts in these complaints failed to conduct the consultation meetings at all, even though this requirement became effective July 1, 2005, under the Individuals with Disabilities Education Improvement Act of 2004. Extensive corrective action was warranted, including the conduct of the consultation meeting by mid-January of 2008. The school districts also had to explain how they will timely and appropriately conduct future consultation meetings.

COURT JESTERS: BARKING MAD

There aren't many jokes involving veterinarians. In one of the few that do, a lady disagreed with a veterinarian's observation that there was nothing wrong with her pet. "How can you say there is nothing wrong with my precious when you've not provided anything close to a complete examination?" she complained.

The doctor brought in a Labrador Retriever, who sniffed over the animal and then barked several times in the direction of the veterinarian. It then trotted out of the examination room. Soon, a tabby sauntered in, walked about the pet, inspecting it from every angle, mewed towards the veterinarian, and then walked back out. The veterinarian then told the lady–again–that there was nothing wrong with her pet. "Just send me your bill!" she snapped and stormed out.

After she received a bill for $550, she called the doctor for an explanation. "Well," he said, "fifty dollars is for my initial examination. The rest is for the lab report and cat scan."

What happened in Columbus, Ohio, to R. J. Becher, D.V.M., was no laughing matter, however. In 1960, Dr. Becher operated a small-animal hospital. Many of Dr. Becher's patients were dogs. Dogs bark, as a general proposition. Where several of the species are present, expect a chorus; if one purchases a house near Dr. Becher's establishment, one should expect to *hear* the chorus.

At the time, Columbus had a city ordinance that read: "No person shall harbor any animal or fowl...which howls or barks or emits audible sounds to the annoyance of the inhabitants of the city." One who transgresses this law could be subject to a fine of $300 and imprisonment up to 90 days (or both).

Some "inhabitants of this city" became annoyed at the canine cacophony issuing forth one evening. The city charged the doctor with violation of the ordinance. Despite the fact his hospital had been in operation for 15 years (longer than the "annoyed inhabitants" had lived nearby) and was in an area zoned for such commercial purposes, he was convicted and fined $50. Dr. Becher appealed.

In *City of Columbus v. Becher*, 180 N.E.2d 836 (Ohio 1962), the Ohio Supreme Court reversed, finding the ordinance "too indefinite and too broad in its terms to be effective and valid[.]" *Id*. at 837.

Judge Charles B. Zimmerman, writing for the majority (yes, there were dissenters), noted that Dr. Becher's hospital had operated for a number of years without complaint, was a lawful pursuit, and was a well run establishment located in a municipal zone where such activities are permitted.

> Moreover, hospitals of the kind here involved are a concomitant of modern civilization. They serve a useful and humanitarian purpose in inducing the curing of ailments, the alleviation of suffering and the control of contagious and infectious diseases dangerous to both humans and animal.

Id. at 838. But Judge Zimmerman did not stop there. He evidently believed those annoyed by the hospital's inmates may be just a bit thin-skinned and could benefit from some versification on his part.

> Dogs will howl and cats will yowl
> When placed in congregation
> These grating sounds may oft result
> In human aggravation.
>
> Laws passed to curb such
> pesky noise
> Should fit the situation
> And be so phrased in art-
> ful ways
> To cause no obfuscation.

In other words, the laws
so passed
Must plainly be effective
Inaptly framed, they lack
the force
To meet their planned
objective.

Id. This seems to have satisfied the parties. The dispute did not re-cur.

QUOTABLE . . .

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution.... Public schools must not forget that "in loco parentis" does not mean "displace parents."
>
> Circuit Judge Jane R. Roth in *Gruenke v. Seip*, 225 F.3d 290, 307 (3rd Cir. 2000), a case involving allegations that a swim coach required a student athlete to take pregnancy tests.

UPDATES

Computers and Online Activity: Student Free Speech and "Substantial Disruption"

The **Quarterly Report** for October-December: 2006 discussed a number of computer-related issues affecting student discipline, including cyber-bullying, hacking, and the extent to which public schools can regulate student speech that occurs off school grounds. This latter area often implicates First Amendment free-speech issues.[7] This remains a battleground.

In *Wisniewski v. Bd. of Education of the Weedsport Central School District*, 494 F.3d 34 (2nd Cir. 2007), an eighth-grade student created an icon for his personal computer use (Instant Messaging with his friends) that depicted a pistol firing a bullet at the head of a person. Below the drawing were the words, "Kill Mr. VanderMolen" (his English teacher). Although he did not create this icon at school and did not send it to any school official, the English teacher learned of the drawing. The student was eventually suspended for a semester. His parents sued, alleging the discipline violated the student's free-speech rights. The federal district court and the U.S. Second Circuit Court of Appeals found the "speech" in question was not protected speech, as

[7]"Congress shall make no law...abridging the freedom of speech...."

contemplated by *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969) or *Morse v. Frederick*, 127 S. Ct. 2618 (2007). The icon constituted misconduct that posed a reasonably foreseeable risk that would materially and substantially disrupt the work and discipline of the school. It was immaterial that the icon was transmitted off-campus using non-school equipment. It was reasonably foreseeable the icon would reach school officials. The speech was not only offensive, it was threatening. The student was aware that the making of threats was considered a material disruption.

A continuing dispute involves Justin Layshock and the Hermitage School District. Layshock posted a "parody profile" of his principal on a MySpace.com website. The profile contained the principal's photograph (copied from the school district's website) and purported answers, mostly vulgar, to an online survey. Layshock created the profile on his own time, using his grandmother's computer. The profile created something of a "buzz" around the school, so much so that the computer system crashed when numerous students attempted to access the site using the school's computers. The school sought to discipline Layshock, arguing that his conduct, even though it occurred off-campus during non-school time and through the use of non-school equipment, nevertheless constituted a substantial disruption within the school district. Such speech, the school asserted, is not protected speech under *Tinker*. The federal district court found that this may be so and, accordingly, denied Layshock's motion for temporary injunction to prevent the school from disciplining him. *Layshock v. Hermitage School District*, 412 F.Supp.2d 502 (W.D. Pa. 2006).

Later, after the record had been more fully developed, the federal district court found the school district did violate Layshock's First Amendment rights. In *Layshock v. Hermitage School District*, 496 F.Supp.2d 587 (W.D. Pa. 2007), the court applied *Tinker* and found that Layshock's conduct did not cause a substantial disruption within the school, nor was it likely to. His parody was but one of several directed at the principal (the identities of the authors of the other three parodies were never discovered).

> The threshold, and most difficult, inquiry is whether the school administration was authorized to punish [Layshock] for creating the profile. The mere fact that the Internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited. Schools have an undoubted right to control conduct within the scope of their activities, but they must share the supervision of children with other, equally vital, institutions such as families, churches, community organizations, and the judicial system.

496 F.Supp.2d at 597. The court recognized that a school district could discipline a student for off-campus conduct, but where the off-campus conduct involves student speech, the school "must demonstrate an appropriate nexus." *Id*. at 599. In this case, the nexus could not be established. There was insufficient evidence that it was Layshock's parody, rather than the other three, that caused the "buzz" in the school. More disruption was created by the school in the conduct of its investigation than by the parodies. Any disruption that may have occurred was minimal: no classes were cancelled, no widespread disorder occurred, there was no violence of any sort. Layshock was entitled to summary judgment on his First Amendment claim.

On October 23, 2007, the federal district court denied the school district's motion for entry of final judgment so that it could appeal to the U.S. Third Circuit Court of Appeals. The district court noted that the case has not been fully disposed of: There has not yet been a determination of the amount of Layshock's compensatory damages and attorney fees. *Layshock v. Hermitage School District*, 2007 U.S. Dist. LEXIS 78524 (W.D. Pa. 2007).

Requa v. Kent School District No. 415, 492 F.Supp.2d 1272 (W.D. Wash. 2007) involved both on-campus and off-campus activity. Gregory Requa secretly videotaped one of his high school teachers in her classroom and then posted the video on YouTube.com, accompanied by lewd remarks and gestures**,** along with the song "Ms. New Booty," a reference to her posterior. Requa drew a 40-day suspension for his artistic endeavors. He sued, asserting the school's disciplinary action violated his First Amendment free-speech rights (as well as his Fourteenth Amendment due process rights). The federal district court declined to grant Requa's request for injunctive relief to reinstate him in school. Although the federal district court conceded his off-campus efforts (the posting of the video) may have been protected speech, his surreptitious filming of the teacher was not. The school district had a policy against sexual harassment and a policy against the use of electronic devices in school, both of which Requa violated. His suspension (which would be reduced 20 days upon completion of a writing assignment) was not excessive. A student does have a legitimate right to critique the performance and competence of teachers, but this right must be balanced against the school district's responsibility to provide a safe and supportive learning environment for students and teachers alike.

Bible Distribution

In *Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160 (7th Cir. 1993), *cert. den.* 508 U.S. 911, 113 S. Ct. 2344 (1993), the 7th Circuit found that a Bible distribution program in a public school district violated the Establishment Clause. Gideons International annually distributed Bibles to fifth-grade students during school hours during an assembly.[8] The 7th Circuit decision followed a number of other decisions from federal and state courts finding the same practice to violate the Establishment Clause of the First Amendment. See *Meltzer v. Board of Public Instruction*, 548 F.2d 559 (5th Cir. 1977); *Chandler v. James*, 985 F.Supp. 1094 (N.D. Ala. 1997); *Goodwin v. Cross County School District. No. 7*, 394 F.Supp. 417 (E.D. Ark. 1973); *Tudor v. Board of Education*, 100 A.2d 857 (N.J. 1953); and *Brown v. Orange County Bd. of Public Instruction*, 128 SO. 2d 181 (Fla. App. 1960). The latest dispute has arisen in the South Iron R-1 School District in Missouri.

1. *Doe v. South Iron R-1 School District*, 498 F.3d 878 (8th Cir. 2007) involved the distribution of Bibles to fifth-grade students by Gideons International. In 2005, the school district's superintendent discontinued the practice, but members of the Ministerial Alliance asked the school board to reconsider. The superintendent advised the school board that "four legal sources" stated the practice should be discontinued and that should the school board wish to continue, it should adopt an "open forum" policy. Instead, the school board, by a 4-3 vote,

[8]See "Bible Distribution," **Quarterly Report** January-March: 1995.

decided "to pretend this meeting never happened, and to continue to allow the Gideons to distribute Bibles as we have done in the past." 498 F.3d at 880. Shortly thereafter, the American Civil Liberties Union (ACLU) wrote to the board, protesting the action. The school board delayed the distribution program in order to research the legalities. Notwithstanding, the school board later voted 4-3 to allow the Gideons to continue its Bible distribution (even though its insurance carrier warned such activities were illegal and may not be covered by the policy). The superintendent resigned and the school board's attorney asked the school board to reconsider its decision. It declined to reconsider. The Gideons then came to the elementary school and distributed Bibles to the two fifth-grade classes.

Parents sued, complaining the Bible distribution violated the First Amendment's Establishment Clause. The school board would not back down. The insurance carrier advised the school board that its actions constituted an intentional violation of the U.S. Constitution (and the Missouri Constitution as well). The insurance carrier stated it would not defend the lawsuit. *Id.* at 881. The federal district court granted the parents' request for a preliminary injunction, barring the school board from allowing the distribution of Bibles to elementary school children on school property during the school day. *Doe v. South Iron R-1 Sch. Dist.*, 453 F.Supp.2d 1093 (E.D. Mo. 2006). The school board appealed. The federal district court relied directly upon *Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160 (7th Cir. 1993) in finding that the parents had shown a substantial likelihood of success on the merits of their claim that the practice of allowing the Gideons to distribute Bibles to fifth-grade students in their classrooms, during the school day and with the visible support of school officials, violates the Establishment Clause. The 8th Circuit affirmed the district court's grant of injunctive relief.

The 8th Circuit agreed with the 7th Circuit's *Berger* decision "that distributing bibles to fifth graders in the classroom raises far graver Establishment Clause concerns than, for example, permitting outside groups to distribute religious flyers on school premises or inviting ministers to give nonsectarian prayers at graduation ceremonies." 498 F.3d at 883.

2. The parties found themselves back at the federal district court, where both parties moved for summary judgment. In *Roark, et al. v. South Iron R-1 School District, et al.*, 2008 U.S. Dist. LEXIS 1083 (E.D. Mo. 2008), the federal district court denied the school district's Motion for Summary Judgment but granted the plaintiffs' motion. At issue was the original policy addressed *supra* by the 8th Circuit as well as a policy the school board attempted to introduce a week before the hearing scheduled to address the plaintiffs' original request for a preliminary injunction. The new policy would permit outside groups to distribute literature, including Bibles, in the schools during the school day but only in two (2) designated locations (cafeteria and in front of the administrative offices). The district court found that both the original and the subsequent policies were designed to promote Christianity.

   The district court noted that the Gideons' Bible distribution had occurred in the school district for as long as 30 years. Some current and former school board members recall receiving Bibles from the Gideons when they were in the fifth grade. The superintendent questioned the legality of the practice, as did numerous others (notably, the school district's insurer), including the school board's attorney. Notwithstanding, the school board permitted the

practice to continue. After suit had been filed and before the district court's hearing on the request for injunctive relief, the school board passed its new policy. However, it did not repeal or rescind any of its past motions regarding the Bible distribution and did not discuss any details of the new policy.

The school board argued that the case is now moot based on its new distribution policy. The district court noted that the school board voluntarily changed or discontinued its purportedly unconstitutional activity. Under such circumstances, the district court's analysis must address whether the controversy is settled or whether the defendant's conversion is merely a pretext that would permit the defendant to return to its old ways once this controversy has been dismissed.

> For the Court to find that the case has become moot, the party asserting mootness has the heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated or that the challenged conduct will not start up again.

2008 U.S. Dist. LEXIS 1083 at *19-20. The school board provided no indication as to why it passed its new policy. The school board's past actions and comments, when considered with the timing and circumstances of the new policy, indicates the policy was passed in response to this litigation.

> The School Board defendants may have voted to pass the new policy, but there is absolutely no indication that they did so because they realized that their old practice was flawed and possibly unconstitutional. To the contrary, they continue to argue that their past practice was proper, and statements from their depositions show that many of them do not view the new policy as either a necessary or a positive change.

Id. at *22. Indeed, statements from the depositions of the school board members demonstrate that the school board not only does not view its prior practices as flawed, but "also indicate a lack of willingness to comply with the law in the future." *Id*. at *23. The district court found that the school board did not have "bona fide motives and were [not] passing the new policy with a genuine intent to comply with the law." As a consequence, the Plaintiffs' challenge is not moot. *Id*. at 24.

The district court then analyzed the past practice under the so-called *Lemon* test as derived from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). Under *Lemon*, a government practice passes constitutional muster for Establishment Clause purposes where the challenged practice (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; and (3) does not foster excessive entanglement with religion. The district court noted that numerous other federal and state courts have already found this same Gideons' distribution practice to be unconstitutional, including *Berger*. The court rejected the school board's argument that it has maintained an "open forum" all along, and that enjoining the Gideons amounted to viewpoint discrimination.

> The evidence shows that the only group who has been allowed access to the students in the classroom during the school day is the Gideons. The Board's conclusion that it has been operating under an open forum policy all along is based on self-serving, after-the-fact justifications that are devoid of any reliable support.

Id. at *30-31. The school board could not identify any secular purpose for the distribution of Bibles by outside adults during school hours in the classroom. The Bibles were not part of the classroom curriculum and were not intended to serve an educational function. "The Gideon Bible distribution served no secular legislative purpose. The principal or primary effect of the classroom Bible distribution was the advancement of religion." *Id*. at *32.

> The distribution of Bibles in the classroom during school hours with school personnel present sends a message of endorsement of the Bible and its teachings, especially when the audience is impressionable elementary school students. Additionally, the distribution's location, time, and circumstances created an excessive entanglement with religion.

Id. at *33. The district court found the past practice to be unconstitutional, adding that the plaintiffs "are entitled to an injunction to assure that defendants do not revert back [sic] to their old policy once this lawsuit is over." *Id*. at *34.

The district court then addressed the school board's new policy under the *Lemon* three-part test. Under *Lemon*'s "purpose prong," one must adopt the perspective of the objective observer who is acquainted with the text, legislative history, and implementation of the statute or comparable act. "When faced with a professed secular purpose for an arguably religious policy, the courts have a duty to distinguish whether the secular purpose is genuine or a sham, and to ensure that the purpose is not merely secondary to a religious objective." *Id.* at * 36-37.

The school board argued that since it passed the new policy without any comment, there is no evidence to suggest the policy was intended to perpetuate the past practice. The court, however, noted that the lack of comment does not shed any light on the purpose of the new policy, but "[t]he history of the Board's actions...speaks volumes." *Id.* at 37. Unfortunately for the school board, the history supports a conclusion that the "purpose of this new policy is to promote Christianity by providing a means for Christian Bibles to be distributed to elementary school students." *Id*. at *37-38. That history includes the school board's refusal to heed warnings from its former superintendent, its attorney, its insurer, and many others, and its disinclination to cease the former practice until faced with this lawsuit. The new policy still permits the distribution of Bibles to elementary school students during school hours on school property. "The shift from the old, unwritten policy to the new, written policy is not a dramatic or significant change, as argued by defendants, but its simply a continuation of the previous policy's allowance of Bible distribution at school." *Id*. at *38-39.

> The silence of the School Board when passing the new policy not only leaves this Court with no statement of governmental purpose, it also indicates no repudiation or change of heart on the part of the School Board members.

> This silence, in combination with the history and evolution of the new policy, including the timing of its passage, would lead a reasonable observer to believe that the Board's purpose has not changed.

Id. at *41. Because the school board cannot satisfy the initial "purpose prong" under *Lemon*, the practice is unconstitutional. There is no need to consider the second and third prongs. *Id.* at *42. The new policy was enjoined. *Id*. at *50.

Date: _____

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Indiana Department of Education

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